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Nos. 96-2018 & 97-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
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AEDC FEDERAL CREDIT UNION, TENNESSEE CREDIT UNION LEAGUE AND CREDIT UNION NATIONAL ASSOCIATION, INC.,

Petitioners,

v.

FIRST CITY BANK AND TENNESSEE BANKERS ASSOCIATION,

Respondents.

NATIONAL CREDIT UNION ADMINISTRATION,

Petitioner,

v.

FIRST CITY BANK AND TENNESSEE BANKERS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS FIRST CITY BANK AND TENNESSEE BANKERS ASSOCIATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether banks that compete for customers against credit unions have standing to challenge decisions of the National Credit Union Administration permitting federal credit unions to expand their fields of membership in violation of the "common bond" requirement of the Federal Credit Union Act, 12 U.S.C. §1759.

2. Whether the National Credit Union Administration is violating the Federal Credit Union Act requirement that membership in a federal credit union be limited to persons who share a single common bond by approving amendments to credit union charters to allow multi-employer credit unions in which members do not share a common bond.

PARTIES TO THE PROCEEDING

The Petitions accurately list the parties to the proceeding. Pursuant to Rule 29(6), the parents and subsidiaries (except wholly-owned subsidiaries) of the Respondents are as follows: First City Bank ("First City") merged into First American National Bank as of March 11, 1996. First American Corporation is the parent company of First American National Bank. INVEST Financial Corporation is the only nonwholly owned subsidiary of First American National Bank. Although the merger has changed the technical identity of First City, the bank will continue to be referred to as First City in this response, as it was in the proceedings below. Respondent Tennessee Bankers Association ("TBA") has no parent companies or nonwholly owned subsidiaries.

At the time the Complaint was filed, First City was a banking corporation, chartered by the State of Tennessee, with its principal office in Murfreesboro, Tennessee. First City had seven branches in the Middle Tennessee area and was a member of the Tennessee Bankers Association and the American Bankers Association.

The TBA is the principal state trade association for commercial banks, savings and loan associations and trust companies in Tennessee. All 252 state and federally chartered banks or trust companies and all 32 state or federally chartered savings banks or savings and loan associations are members of the TBA. The member banks, savings banks, and savings and loan associations of Tennessee offer deposit accounts, loans, and other financial services to citizens of Tennessee. In many locations, association members offer these services in direct competition with credit unions. The policies and actions of the NCUA and the manner in which they influence the operation of credit unions have a direct and significant impact on the banking business and the competitive environment for financial services.

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

THE COMMON BOND REQUIREMENT AND FEDERAL CREDIT UNION EXPANSION 2

ARGUMENT 5

I. There are no special and important reasons for granting these petitions for writ of certiorari. 5

II. The lower court's decisions were well-grounded in the law and it is not likely that Petitioners will succeed on the merits in having these decisions reversed. 7

A. As competitors of federal credit unions, Respondents have standing to challenge the NCUA's violation of the common bond requirement. 7

B. NCUA policy of permitting multi-employer credit unions whose members do not share a common bond violates the FCUA requirement that all members of a credit union must share a single common bond. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

AT&T Family Federal Credit Union and Credit Union National Association, Inc. v. First National Bank and Trust Co., et al., (No. 96-847) 2, 5

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10

Clarke v. Security Indus. Ass'n, 479 U.S. 388 (1987) 8

Community First Bank v. NCUA, 41 F.3d 1050 (6th Cir. 1994) 1, 8

First Nat'l Bank & Trust v. Nat'l Credit Union Administration, 988 F.2d 1272, 1275-76 (D.C. Cir. 1993) 4, 8

National Credit Union Administration v. First National Bank & Trust Co., et al., (No. 96-843) .. 2, 5

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 6

Statutes and Regulations

117 S. Ct. 1079 (1977) 2

12 U.S.C. §1751 ..... 1, 2

12 U.S.C. §1752(1) (1989) 3

12 U.S.C. §1759 3

12 U.S.C. §1768 3

47 Fed. Reg. 16,775 (1982) 9

479 U.S. at 403 8

5 U.S.C. §706 1

54 Fed. Reg. 31,165 (1989) 10

59 Fed. Reg. 29,066 (1994) 10

IRPS 89-1 ..... 9, 10

IRPS 94-1 9

STATEMENT OF THE CASE

This action arises under the Federal Credit Union Act ("FCUA" or "Act"), 12 U.S.C. §1751 *et seq.*; the Administrative Procedure Act, 5 U.S.C. §706; and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202. First City and the TBA ("Respondents") brought this suit in the United States District Court for the Middle District of Tennessee, Nashville Division, in order to challenge the National Credit Union Administration's ("NCUA") interpretation of the FCUA and to prevent the NCUA from continued violation of the Act.

On December 15, 1994, the Court denied Motions to Dismiss for lack of standing filed by the NCUA and AEDC Federal Credit Union, Tennessee Credit Union League, and Credit Union National Association, Inc. (the "Credit Union Parties"). The Court of Appeals for the Sixth Circuit had decided in Community First Bank v. NCUA, 41 F.3d 1050 (6th Cir. 1994), that the banking parties did have standing to challenge NCUA decisions. Therefore the Motion to Dismiss was not well-taken.

Subsequently, all parties filed cross motions for summary judgment on the merits. On August 29, 1995, the District Court ruled in a Memorandum Opinion that the NCUA and Credit Union Parties' motions for summary judgment should be granted and that First City and TBA's motion for summary judgment should be denied.

First City and the TBA appealed to the Sixth Circuit arguing that the District Court erred in concluding that the NCUA reasonably interpreted the FCUA to allow multiple occupational groups, each of which independently shares a "common bond", to join a single credit union. On April 14,

1997, the Sixth Circuit agreed that the District Court had erred and therefore reversed the lower court's decision.

Several months earlier, on February 24, 1997, this Court granted the petitions for certiorari in National Credit Union Administration v. First National Bank & Trust Co., et al., (No. 96-843) and AT&T Family Federal Credit Union and Credit Union National Association, Inc. v. First National Bank and Trust Co., et al., (No. 96-847), consolidating the two cases for argument. 117 S. Ct. 1079 (1977) (the "D.C. Circuit case").

The Credit Union Parties have filed a Petition for Writ of Certiorari seeking review of the Sixth Circuit's decision. The NCUA has filed a separate Petition for Writ of Certiorari. The two issues presented by the NCUA and the Credit Union Parties in their respective Petitions are identical to the issues currently pending before this court in the D.C. Circuit case. Both the Credit Union Parties and the NCUA ask this Court to hold the writ pending this Court's decision in the D.C. Circuit case and then dispose of it accordingly. Respondents file this brief in opposition to both the NCUA and Credit Union Parties' Petitions for Writ of Certiorari and respectfully request that both Petitions be denied.

THE COMMON BOND REQUIREMENT AND FEDERAL CREDIT UNION EXPANSION

Congress enacted the FCUA, 12 U.S.C. §1751, *et seq.*, thereby creating credit unions which were designed to be cooperatives, owned and managed by their members. Credit unions were created in order to enable persons who did not have enough money to save and borrow at banks to pool their resources for saving and lending among themselves.

Federal credit unions receive unique benefits and are subject to limitations legislated by the Act. One of the most significant benefits conferred upon credit unions is that they are exempt from state and federal taxation pursuant to 12 U.S.C. §1768. Credit unions have a substantial competitive advantage over traditional financial institutions because of this tax exempt status. For instance, credit unions are able to use non-taxable income to offer more favorable rates on checking and savings accounts, to charge lower rates on loans, and to offer accounts free of service charges.

Congress also intended that federal credit unions be limited in certain respects. Specifically, Federal credit unions are to use their resources to benefit their members, all of whom must share a common bond. 12 U.S.C. §1752(1) (1989). Section 109 of the FCUA, 12 U.S.C. §1759, provides that:

> Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

This case concerns federal credit unions claiming a "common bond of occupation."

The common bond requirement is an essential component in the FCUA:

> Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about the applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could 'loan on character' . . . . The common bond was seen as the cement that united credit union

> members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.

as quoted in First Nat'l Bank & Trust v. Nat'l Credit Union Administration, 988 F.2d 1272, 1276 (D.C. Cir. 1993). The NCUA has a responsibility of enforcing the Act and in particular must enforce the common bond requirement.

In the geographic region where First City is located, one of the largest federal credit unions is AEDC Federal Credit Union ("AEDC"), which now has more than 300 disparate occupational and associational groups as a result of unfettered expansion condoned and encouraged by the NCUA. AEDC credit union was first organized on July 12, 1951, as a federal credit union. Initially its office was at Tullahoma, Tennessee and its area of operation was in Coffee and Franklin Counties, Tennessee. AEDC's original field of membership was limited to:

> Employees of ARO, Inc. and civilian employees and commissioned officers of the U.S. Air Force and Corps of Engineers assigned to or stationed at Arnold Engineering Development Center in Coffee and Franklin Counties, Tennessee; employees of this credit union; and members of their immediate families; and organizations of such persons.

In recent years, AEDC has sought and received approval from the NCUA for numerous additions to its field of membership. AEDC's membership no longer has any connection to or common bond with the original AEDC employers.

AEDC now includes in its field of membership groups that are engaged in such divergent activities as manufacturing,

newspaper publishing, chiropractic care, media services, food and entertainment services, retail sales and the practice of law. AEDC has grown to its present size because it has made, and the NCUA has granted, more than 100 separate requests to add to its field of membership.

The NCUA essentially does not limit who can become a member of a federal credit union. When processing field of membership expansion requests, the NCUA requires only minimal information. In fact, these requirements for membership are so lax that "employee groups" can actually be one person. The result is that virtually anyone can now become a member of AEDC Federal Credit Union.

Due to the NCUA's interpretation of the common bond requirement, AEDC now is a conglomerate financial institution that sells financial services to "members" in a number of different states representing more than 300 totally unrelated groups. Although AEDC's membership no longer has a common bond, the credit union still reaps the competitive advantage of being tax exempt and retaining all other statutory privileges of a federal credit union.

ARGUMENT

I. There are no special and important reasons for granting these petitions for writ of certiorari.

Petitioners correctly point out that the two questions presented in these Petitions are the same questions on which this Court has granted certiorari in National Credit Union Admin. v. First National Bank & Trust Co., et al. (No. 96-843) and AT&T Family Federal Credit Union and Credit Union National Association, Inc. v. First National Bank & Trust Co., et al., (No. 96-847). Simply because the Court has granted

certiorari in those two cases does not mean that certiorari should be granted in this case. There is no reason why the Court should exercise its discretion to review the issues in this case. Certainly the issues are not unique since the Court is already reviewing them. This Court has stated time and time again that there is a compelling need to preserve the Court's limited resources. The present Petitions are repetitive and merely serve to further burden this Court's docket. Moreover, granting these Petitions will require the parties unnecessarily to expend additional time and resources in defending this appeal. A simple denial of the Petition will result in conservation of both judicial and client resources.

Generally, this Court will only grant a petition for writ of certiorari where there are special and important reasons for such review. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). There is no conflict between the United States Court of Appeals as to either one of the issues raised in the Petitions. To the contrary, both the D.C. Circuit and the Sixth Circuit have agreed that banks do have standing to bring this case and that the NCUA has violated the FCUA by allowing multi-employer credit unions in contravention of the common bond requirement.

A writ of certiorari will be granted only where some useful purpose may be accomplished. In this case, the granting of a writ would accomplish nothing since the key issues are already pending before this Court and have already been briefed. The Credit Union Parties essentially agree with this position and they state in their Petition that "there is no need for the Court to grant plenary review in this case ." Petition at p. 10. Petitioners therefore have requested that "the Court should hold this case pending the outcome in" the D.C. Circuit cases. The NCUA makes the same request in its Petition. However, the Petitioners have provided no justification for granting a Petition

in a case identical to the pending D.C. Circuit case. Further, no procedural basis have been given for asking the Court to simply "hold" the case. For the foregoing reasons, Respondents respectfully request that this Court deny both Petitions for Writ of Certiorari.

II. The lower court's decisions were well-grounded in the law and it is not likely that Petitioners will succeed on the merits in having these decisions reversed.

At the time that this Court granted certiorari in the D.C. Circuit case, the Sixth Circuit had heard oral arguments but had not yet ruled on the case at hand. At that point, there was a potential for conflicting circuit court decisions. Now, two circuit courts have addressed the very same issues as are presented by the NCUA and Credit Union Parties in their Petitions. This changed circumstance materially alters the importance of granting these Petitions.

The lower court's decisions follow well-established rules of statutory construction and this Court's precedents and, therefore, it is unlikely that review of this case will establish any significant principle of law. Moreover, the Petitioners will not succeed on the merits in having these decisions reversed.

A. As competitors of federal credit unions, Respondents have standing to challenge the NCUA's violation of the common bond requirement.

The District Court's decision that Respondents have standing was a straightforward and correct application of this Court's decisions. No new or important "standing" issue is presented in this appeal. To the contrary, the District Court's decision was a routine and correct application of both the Sixth

Circuit and this Court's jurisprudence on competitor standing. See Clarke v. Security Indus. Ass'n, 479 U.S. 388 (1987) and Community First Bank v. NCUA, 41 F.3d 1050 (6th Cir. 1994).

Respondents have constitutional standing because they have suffered and will continue to suffer "injury in fact" as a direct result of the NCUA's actions. The D.C. Circuit has held that Plaintiff banks meet the test for "injury in fact." First National Bank and Trust Company v. National Credit Union Administration, 988 F.2d 1272 (D.C. Cir. 1993). In that case, the D.C. Circuit quickly dismissed the NCUA's argument that the banks lacked constitutional standing and stated that the fact that the banks "will suffer competitive or economic injury is not in doubt." Id. at 1275.

In Community First Bank v. National Cred. Union Admin., 41 F.3d 1050, 1053 (6th Cir. 1994), the Sixth Circuit noted that "the real issue is whether the [banks] satisfy the prudential standing requirements." The Sixth Circuit held that "the competitor banks are suitable challengers to the NCUA's action and do have standing." Id. at 1054. This decision is in agreement with this Court's Clarke decision and the D.C. Circuit's ruling in First National Bank.

In Clarke, this Court held that the trade associations of security firms had prudential standing to challenge agency approvals of activities of commercial banks that allegedly violated the banking statutes. The security dealers had standing because they were attempting to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by national banks. 479 U.S. at 403.

Similarly in this case, the banking industry respondents have standing to enforce the requirement that was intended by Congress to limit the reach and scope of services offered by

credit unions. The "common bond" requirement of the FCUA is explicitly a limit on credit union reach, just as the Glass-Steagall Act and the McFadden Act are limits on bank activities. Thus, the banking industry respondents are suitable challengers to guard the congressionally drawn boundary of the common bond requirement and do have standing.

B. NCUA policy of permitting multi-employer credit unions whose members do not share a common bond violates the FCUA requirement that all members of a credit union must share a single common bond.

From 1934 until 1982, the common bond provision meant to the NCUA and its predecessor agency that a credit union had to be comprised of a group of individuals that had a single common bond. In 1982, the NCUA changed its previous interpretation of the common bond provision and allowed unrelated groups to join credit unions. The fact that the common bond provision was interpreted by the NCUA for a period of approximately 50 years to require a single common bond per credit union is extremely important. If the common bond provision had meant in 1934 what the NCUA and credit union parties now argue it means, then the statute would have been interpreted that way prior to the 1982 policy change.

When the NCUA adopted its new, expansive membership policy, it was forced to re-write the applicable regulations. 47 Fed. Reg. 16,775 (1982). The NCUA regulates the membership of federal credit unions through interpretive ruling and policy statements. The NCUA provided in IRPS 94-1 and its predecessor IRPS 89-1 that credit unions can expand their federal membership to include groups that admittedly have no common bond with one another and that a federal credit union can consist of a combination of occupational and associational

groups. 59 Fed. Reg. 29,066 (1994) ("IRPS 94-1"); 54 Fed. Reg. 31,165 (1989) ("IRPS 89-1").

It was not until the NCUA promulgated IRPS 89-1 that federal credit unions began to expand their membership substantially through charter amendments. Thus, the impact of what the NCUA has permitted to happen with AEDC and other federal credit unions was not felt by Respondents immediately upon the policy change in 1982. Rather, the harm caused by the NCUA's violation of the common bond requirements only began affecting Respondents after IRPS 89-1 was promulgated. Therefore, the Credit Union Parties' implication that Respondents delayed in bringing this action is unfounded.

The vast majority of the growth of AEDC occurred within a few years of First City filing its initial Complaint. Since the Complaint was filed, AEDC has continued to expand its field of membership at an astonishing rate. In 1994 alone, AEDC requested and was granted permission to expand its charter on 6 different occasions to add 25 additional select employee groups. During this same time period, the NCUA approved a merger allowing AEDC to add 72 employee and associational groups. Thus, AEDC increased its size by almost one-third in a single year.

The Sixth Circuit properly applied the Chevron test to the NCUA's revised interpretation of a statutory requirement. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The court correctly concluded that the NCUA's current interpretation conflicted with the unambiguous statutory mandate. After applying traditional tools of statutory construction to discern congressional intent, the Sixth Circuit found that the intent is clear. The language and purpose of the provision dictate the conclusion that the

NCUA's interpretation is incorrect because it would rob the "common bond" requirement of its meaning.

The Sixth Circuit found persuasive Respondent's argument based on the basic canon of statutory construction that the same language in a statute must be accorded a consistent meaning within the same section of the statute. The Court found that the NCUA violates this basic rule by construing the Act to permit occupation-based credit unions to include multiple unrelated groups whereas the NCUA recognizes that the Act forbids community-based credit unions to include members from different, unrelated communities.

The Sixth Circuit agreed with the D.C. Circuit Court that the only reasonable way to read the occupational clause ("limited to groups having a common bond of occupation") consistently with the community clause ("groups within a well-defined neighborhood, community or rural district") is that the common bond would restrict each federal credit union to consisting of a group that collectively had a single common bond. To interpret it the opposite way, community based credit unions could expand beyond well-defined neighborhoods by grouping geographical based credit unions together. Taken to its logical conclusion, geographical based community credit unions could expand, through charter amendments, nationwide.

"Finally, and perhaps most importantly" the Sixth Circuit determined that, "if the NCUA's interpretation is accepted, it would make the common-bond requirement meaningless." Credit Union Parties' App. at 12A. "If credit unions are permitted to join together an infinite number of distinct groups, so long as each group has within it a common bond, it makes no sense to have the common-bond requirement at all; essentially, the NCUA's interpretation would allow the joining together of many groups with completely diverse constituencies, basically

obliterating any overall common bond." Id. There is no statutory rationale for requiring the type of "common bond" that Petitioners argue was the original intent of Congress when enacting the FCUA.

CONCLUSION

These Petitions for Writ of Certiorari should not be granted and then held, but rather should be denied. There are no special and important reasons for granting these Petitions. In fact, these Petitions are repetitive and merely serve to waste the Court's limited resources. As a competitor of federal credit unions, Respondents have standing to challenge the NCUA's violation of the FCUA. Indeed, two circuit courts are in agreement that the NCUA's policy of permitting multi-employer credit unions whose members do not share a common bond violates the FCUA requirement that all members of a credit union must share a single common bond. For the foregoing reasons, Respondents respectfully request that this Court deny the Petitions for Writ of Certiorari filed by both the NCUA and the Credit Union Parties.

Respectfully submitted,

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